No. 89-694

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In The

Supreme Court of the United States

October Term, 1989

ELECTRIC POWER BOARD OF CHATTANOOGA

Petitioner,

v.

MONSANTO COMPANY
GENERAL ELECTRIC COMPANY
MCGRAW-EDISON COMPANY
CENTRAL MOLONEY, INC.
WAGNER ELECTRIC CORPORATION
WESTINGHOUSE ELECTRIC CORPORATION
SANGAMO ELECTRIC CORPORATION

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY BRIEF FOR THE PETITIONER ELECTRIC POWER BOARD OF CHATTANOOGA

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Petitioner, Electric Power Board of Chattanooga, presents this Brief pursuant to Rule 22.5 in response to certain arguments raised in the Respondents' Brief in Opposition and in further support of its Petition for Writ of Certiorari.[1]

ARGUMENT

The Electric Power Board of Chattanooga (hereinafter "Chattanooga" or "EPB"), asks that the Court consider the following points in response to arguments raised in the Respondents' Brief in Opposition:[2]

1. *The federally required commencement date under 42 U.S.C. § 9658 and the commencement date under Tennessee law are not identical.* Contrary to the argument pressed by the Respondents there is a clear distinction between the accrual date of a cause of action under Tennessee law and the "federally required commencement date" contained in 42 U.S.C. § 9658. Under Tennessee law, statutes of limitations for tort claims are governed by a form of discovery rule, and commence when a plaintiff discovers his injury or should have discovered it through the exercise of reasonable care and diligence. *See, e.g., McCroskey v. Bryant Air Conditioning Co.*, 524 S.W.2d 487, 491 (Tenn. 1975). On its face, this rule is clearly distinct from the

[1] Pursuant to Rule 28.1, the Electric Power Board of Chattanooga states that the designation of corporate relationships included in its Petition for Writ of Certiorari is currently accurate.

[2] References to the Respondents' Brief in Opposition are referred to herein as "Brief in Opp. at ___."

operative language of 42 U.S.C. § 9658 which, at § 9658(b)(4)(A) defines the "federally required commencement date" to be "the date the plaintiff knew (or reasonably should have known) that the personal injury or property damages referred to . . . were caused or contributed to by the hazardous substance or pollutant or contaminant concerned."

While it is possible that, under certain sets of facts, the federally required commencement date under 42 U.S.C. § 9658 and the commencement date under Tennessee law coincidentally will be identical, that is not true in all cases. It is not true in this case. While both the Tennessee and the federal rule speak to what the "plaintiff knew or reasonably should have known", the federal statute is keyed to the plaintiff's knowledge of a particular fact: that the plaintiff's injury was caused or contributed to by the release of the "hazardous substance or pollutant or contaminant concerned". Because it is thus tied to a plaintiff's specific knowledge that his injury has stemmed from a release of a hazardous substance, the "federally required commencement date" cannot occur prior to the date of that release. In contrast, under the Tennessee rule, "discovery" would take place upon knowledge of the fact of an injury even if there was no knowledge of the connection between the injury and a release of a hazardous substance. Forcing the body of the federal statute into the more restrictive mold of the Tennessee discovery rule would defeat the clear Congressional intent that the carefully described federal commencement date in 42 U.S.C. § 9658 be applied to claims within its scope, not merely that some form of discovery rule obtain.

2. *Chattanooga does not seek review of any findings of fact.* Chattanooga does not seek to have this Court review any factual determination made by the Court of Appeals, let alone a concurrent finding by the Court of Appeals and the District Court. *Cf.* Brief in Opp. at 8. EPB presented evidence that numerous transformers manufactured by each of the Equipment Defendants leaked PCBs into transformer vaults of EPB, contaminating and damaging EPB property other than the transformers themselves, within three (3) years of the date of the commencement of this action. This evidence is undisputed on the record. The evidence consists of inspection reports documenting inspections that began in November of 1982, so that subsequent inspections necessarily show the leaks that occur after that date. R.291: Affidavit of Ronald Fugatt (April 10, 1987). There has been no determination by either the Court of Appeals or the District Court that such leaks, as described, did not occur. Chattanooga seeks review by this Court of the Court of Appeals' determination as to the operation of 42 U.S.C. § 9658 under this admitted set of facts.

3. *Chattanooga has not sought construction of Tennessee state law.* Chattanooga has not claimed that the Sixth Circuit held that Chattanooga's property damage claims accrued before the dates of its injuries. *Cf.* Brief in Opp. at 8. Chattanooga's complaint is directed to the holding of the Sixth Circuit that the "federally required commencement date" under 42 U.S.C. § 9658 can occur at some date prior to the date of the release of the hazardous substance which caused the damage for which recovery is sought. It

is this holding which does violence to the intent of Congress in enacting 42 U.S.C. § 9658.[3]

4. *The releases of hazardous substances at issue are within the scope of 42 U.S.C. § 9658.* The Court of Appeals pretermitted the question of whether 42 U.S.C. § 9658 applied to the releases of hazardous substances at issue in this case, a matter which should be addressed by the Court of Appeals in the first instance. However, contrary to the implication of the argument presented by the Respondents, the facial application of 42 U.S.C. § 9658 to the Petitioner's claim is clear. Cases cited by the Respondents address markedly different factual circumstances and do not provide any support for their claim that the releases of hazardous substances in this case that caused damage to the Petitioner are not releases into the environment from a facility within the meaning of 42 U.S.C. § 9658. Both *Covalt v. Carey Canada, Inc.*, 860 F.2d 1434 (7th Cir. 1988) and *Knox v. AC&S, Inc.*, 690 F.Supp. 752 (S.D. Ind. 1988) involved injuries resulting from exposure to asbestos and are more appropriately analyzed on the basis that certain asbestos actions are exceptions from the scope of CERCLA, rather than on the basis of a restricted construction of 42 U.S.C. § 9658. *See First United Methodist Church of Hyattsville v. United States Gypsum Co.*, 882 F.2d

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[3] Given that 42 U.S.C. § 9658 would preempt the application of state law as to any claims within its scope, Chattanooga has not and will not argue whether or not the Court of Appeals correctly determined the proper accrual date under Tennessee law. However, as a general rule, it appears clear that a series of distinct injuries arising from a single defective product gives rise to a series of causes of action as of the date of each distinct injury.

862, 869 n.12 (4th Cir. 1989). As analyzed by the District Court, involved the release, the case of *Electric Power Board of Chattanooga v. Westinghouse Electric Co.*, 716 F.Supp. 1069 (E.D. Tenn. 1988), as a result of a fire and explosion and resulting rupture of a transformer, of PCBs "within the confines of a penthouse containing electrical equipment." 716 F.Supp. at 1081. Neither situation is comparable to that presented in the present case, where the releases have occurred in outdoor vaults, open to the weather. The Respondents' argument amounts to a claim that there can be no "release" into the "environment" if the environment in question also falls within the definition of "facility". Given the very broad construction of "facility" under CERCLA, such a reading would make § 9658 virtually meaningless. *See, e.g., State of New York v. General Electric Co.*, 592 F.Supp. 291, 295-296 (N.D. N.Y. 1984) ["Facility" includes any place where a hazardous substance has come to be located.]

The Respondents have also asserted that 42 U.S.C. § 9658 is inapplicable to the contamination of downtown transformer vaults at issue here because that contamination could not give rise to a claim for response costs under CERCLA. *See* Brief in Opp. at 14. Contrary to the Respondents' assertion, Chattanooga has never "conceded" that this case does not present an underlying CERCLA claim. Rather, Chattanooga has only stated that it has not asserted a claim under CERCLA against these manufacturers. CERCLA Section 107, 42 U.S.C. § 9607, clearly permits recovery of response costs incurred as a result of releases of PCBs that contaminate the environment, including buildings. The cases relied upon by Respondents involved contamination within buildings

caused by asbestos, a type of contamination for which Congress expressly rejected the availability of cost recovery actions under CERCLA. *See First United Methodist Church of Hyattsville v. United States Gypsum Co.*, 882 F.2d 862, 867-869 (4th Cir. 1989). Respondents appear to argue that 42 U.S.C. § 9658 cannot apply to state law causes of action for personal injuries or property damage if the same causes of action could not be brought against the same defendants under CERCLA § 107, 42 U.S.C. § 9607. This construction of 42 U.S.C. § 9658 would make its reference to state actions for personal injury meaningless, as Section 107 of CERCLA permits no recovery for personal injuries.

Here there clearly would be available a CERCLA cause of action for recovery of response costs incurred as a result of releases of PCBs into open transformer vaults. Even those opinions suggesting that an "underlying" CERCLA claim is necessary for the application of 42 U.S.C. § 9658 do not suggest that the plaintiffs and defendants in the state causes of action to which 42 U.S.C. § 9658 would apply and the hypothetical CERCLA cause of action need be the same, nor is there any basis under the reasoning of the cases cited by the Respondents for such a requirement. The courts in those asbestos cases were merely concerned that the application of 42 U.S.C. § 9658 not stray too far beyond the scope of the subject matter of CERCLA.

CONCLUSION

Petitioner respectfully requests that the Petition for Writ of Certiorari be granted.

Respectfully Submitted,

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